

APPENDIX A

SC-10A

82-1-1

Barney Business, Franklin, Shawnee, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, }
 City of Columbus. }

19 82 TERM

To wit: SEP 15 1982

Harold Peck,

Appellee,

vs.

Duncan Gray Mining Co., et al.,

Defendants;

James E. Duncan

Appellant.

No. 82-842

APPEAL FROM THE COURT OF
APPEALS

HAMILTON

for County

*This cause, here on appeal as of right from the Court of Appeals for.....
 HAMILTON County, was considered in the manner prescribed by law, and,
 no motion to dismiss such appeal having been filed, the Court sua sponte dismisses
 the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR
 INFORMATION
 ONLY
 NOT FOR FILING

*It is further ordered that a copy of this entry be certified to
 the Clerk of the Court of Appeals for..... HAMILTON County for entry.*

*I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the
 foregoing entry was correctly copied from the Journal of this Court.*

Witness my hand and the seal of the Court

this..... day of 19.....

..... Clerk

..... Deputy

APPENDIX A-1

BO-121

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, }
 City of Columbus. }

Harold Peck,

Appellee,

vs.

Duncan Gray Mining Co., et al.,
 Defendants;
 James E. Duncan,
 Appellant.

19...82 TERM
 SEP 15 1982

To wit:.....

No. 82-842

MOTION FOR AN ORDER DIRECTING
 THE COURT OF APPEALS

for..... HAMILTON County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FOR YOUR
 INFORMATION
 ONLY
 NOT FOR FILING

COSTS:

Motion Fee, \$20.00, paid by..... Dole, Rueger & Matthews

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
 this.....day of..... 19.....

..... Clerk

..... Deputy

APPENDIX B

FILED
COURT OF APPEALS
APR 7 1982
CLERK OF COURTS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-810498

HAROLD PECK, **Plaintiff-Appellant.**

vs.

DUNCAN GRAY MINING CO. and
EDWARD GRAY, **Defendants,**
and
JAMES E. DUNCAN, **Defendant-Appellee.**

**MEMORANDUM DECISION AND
JUDGMENT ENTRY.**

**Mr. William S. Wyler, Suite 700, 105 East Fourth
Street, Cincinnati, Ohio 45202, for Plaintiff-
Appellant.**

Mr. Wm. Stewart Mathews, II, 1300 American Building, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and

original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are accordingly passed upon in conformity with App. R. 12(A) as follows:

On May 29, 1979, default judgment was entered against defendant-appellee James Duncan. On July 3, 1980, defendant filed a motion to set aside this judgment pursuant to Civ. R. 60(B)(5). This motion was subsequently granted. Plaintiff-appellant timely appeals this decision.

Plaintiff brings two assignments of error on this appeal. Both assignments advance, as error, the action of the court below in setting aside the default judgment in question. The assignments of error have merit.

To prevail on a motion under Civ. R. 60(B), the movant must demonstrate that he has a meritorious defense or claim to present if relief is granted, that he is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5) and that the motion is made within a reasonable time where relief is sought, as here, under Civ. R. 60(B)(5). *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St. 2d 146, 351 N.E.2d 113. If a trial court exercises its discretion and grants a hearing on the motion, as did the court below, an appeal taken from the court's order will not be decided upon the material submitted with the motion

but upon whether the evidence introduced at the hearing demonstrates that the moving party has met the requirements of *GTE, supra. Bates & Springer, Inc. v. Stallworth* (8th Dist. 1978), 56 Ohio App. 2d 223, 382 N.E.2d 1179.

Careful review of the record before this Court reveals that defendant failed to introduce any evidence at the hearing on the motion that he has a meritorious defense or claim to present if the relief requested is granted. The assignments of error are well taken.

For this reason, it is the Order of this Court that the judgment or final order herein appealed from be, and the same is hereby reversed and the default judgment in favor of plaintiff is hereby reinstated.

It is further ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellee, by his counsel, excepts.

SHANNON, P. J., KEEFE and KLUSMEIER, JJ.

* * * * *

APPENDIX C

**IN THE SUPREME COURT OF
THE STATE OF OHIO**

JAMES E. DUNCAN

APPELLANT

SUPREME COURT NO. 82-842

V. COURT OF APPEALS NO. C-810498

COMMON PLEAS NO. A7809432

EX. NO. 85687

HAROLD PECK

APPELLEE

**NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES**

I. Notice is hereby given that James E. Duncan, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio affirming by dismissal of appeal issued September 15, 1982 the judgment of the First Appellant District, Court of Appeals, Hamilton County, Ohio upholding the validity of state statutes, to-wit: Ohio Revised Code 2715 and 2703.14(G) and Ohio Civil Rule 4.4A, the validity of such statutes and Civil Rule having been drawn in question as being repugnant to the due process clause of the 14th Amendment to the Constitution of the

United States of America and such judgment herein appealed from being in favor of validity.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in such transcript so much of the record as may hereafter be requested by Appellant under Rule 13.2 of the Rules of the Supreme Court of the United States.

III. The constitutionality of O.R.C. 2715 and 2703.14(G) and Ohio Civil Rule 4.4A are being questioned and 28 U.S.C. §2403(b) may be applicable and therefore service of this Notice of Appeal shall be served on the Attorney General of Ohio pursuant to Supreme Court Rule 28.4(c).

IV. The following questions are presented by this appeal:

(a) Whether an attachment statute [O.R.C. 2715] which did not provide for a pre-seizure or post seizure hearing, nor judicial supervision of the attachment procedure, nor the posting of an attachment bond nor did it require the Plaintiff to establish a convincing showing of a need for the attachment, violate the 14th Amendment due process clause to the United States Constitution;

(b) Whether service of process by publication, on an out of state resident-Defendant, O.R.C. 2703.14(G) and Ohio Civil Rule 4.4A, is notice reasonably

calculated to reach the out of state resident-Defendant and consistent with the 14th Amendment due process clause to the United States Constitution;

(c) Whether decisions of the United States Supreme Court are binding on the states through the Supremacy Clause, Article VI of the United States Constitution;

(d) Whether the physical presence of a stock certificate, without other contacts, ties or relations with the forum, is sufficient to establish jurisdiction consistent with the 14th Amendment due process clause of the United States Constitution.

/s/ Robert F. Ristaneo
ROBERT F. RISTANEO
ATTORNEY AT LAW
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2465

PROOF OF SERVICE

I, Robert F. Ristaneo, attorney of record for James E. Duncan, Appellant herein, deposes and says, that on the 24th day of November, 1982, I mailed by first class mail a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Harold Peck by mailing same to his attorney of record Hon. William S. Wyler, French, Marks, Short, Weiner and Valteau, Suite 700, 105

East Fourth Street, Cincinnati, Ohio 45202, that 28 U.S.C. §2403(b) may be applicable and therefore a true and accurate copy has been served on the Attorney General of Ohio, 330 E. Broad Street, State Office Tower, 17th Floor, Columbus, Ohio 43215, thereby serving all parties required by Rule 28 and 33 of the Rules of the Supreme Court of the United States.

/s/ Robert F. Ristaneo
ROBERT F. RISTANEO
ATTORNEY AT LAW
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2465

ATTORNEY FOR APPELLANT,
JAMES E. DUNCAN

STATE OF KENTUCKY)

SS

COUNTY OF FAYETTE)

The foregoing was subscribed and sworn to before me by Robert F. Ristaneo, on this the 24th day of November, 1982.

My Commission Expires June 10, 1985.

/s/ Ann P. Gott
NOTARY PUBLIC, STATE AT LARGE,
KENTUCKY

(Notary Seal)

* * * * *

APPENDIX D

THE STATE OF OHIO, }
HAMILTON COUNTY

Form 100 (10)

Common Pleas Court

I, **ROBERT D. JENNINGS**, Clerk of the Court of Common Pleas, within and for the County and State aforesaid, do hereby certify the within and foregoing to be a true and correct Transcript of the Complaint For Money

Filed October 25, 1978

in the Case No. A7809432, wherein HAROLD PECK PLAINTIFF
DUNCAN-GRAY MINING CO. ET.AL.
DEFENDANTS

as appears from the files and records now in my office.

In Testimony Whereof, I have hereunto subscribed my

name, and affixed the Seal of said Court, at

Cincinnati, this 23rd. day

of June, A. D. 19 80



ROBERT D. JENNINGS,

Clerk of the Common Pleas Court of Hamilton County, Ohio

By Robert D. Jennings Deputy

APPENDIX D-1

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

NO. 7809432

HAROLD PECK

**3245 North Whitetree Circle
Cincinnati, Ohio 45236**

Plaintiff

v.

DUNCAN-GRAY MINING CO.

**Second Floor, Citizens Plaza
Louisville, Kentucky 40202**

JAMES E. DUNCAN

**1025 Dove Run Road
Lexington, Kentucky 40502**

and

EDWARD GRAY

**Rural Route #2
Lexington, Kentucky 40505**

Defendants

COMPLAINT FOR MONEY

1. In late 1975 plaintiff entered into an oral contract with defendants and each of them under the terms of which plaintiff was to attempt to arrange financing for defendants.

2. In the event plaintiff arranged financing for the purposes and in the amount agreed to by plaintiff and defendants, plaintiff would be compensated by

receiving 33-1/3% of the stock of the Duncan-Gray Mining Co..

3. Plaintiff arranged financing for defendants pursuant to the agreement, which was accepted by defendants, however, defendants and each of them have failed to pay plaintiff the amount due and owing although demand has been duly made.

4. The fair and reasonable value of the stock due and owing to plaintiff was \$20,000.00 as of February 1, 1976, the date it became due.

5. Plaintiff has duly demanded payment and said demands have been refused and ignored.

WHEREFORE, plaintiff demands judgment jointly and/or severally against defendants in the amount of \$20,000.00 plus interest at the maximum legal rate from February 1, 1976, together with costs.

/s/ Robert A. Pitcairn, Jr.

Robert A. Pitcairn, Jr.

Trial Attorney for Plaintiff

1504 First National Bank Bldg.

Cincinnati, Ohio 45202

Telephone: (513) 381-8616

* * * * *

APPENDIX D-2

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

No. 7809432

HAROLD PECK

Plaintiff

v.

**DUNCAN-GRAY MINING CO.,
et al.**

Defendants

STATE OF OHIO :
 : SS:
COUNTY OF HAMILTON:

AFFIDAVIT OF HAROLD PECK

1. Harold Peck, being first duly cautioned and sworn state and aver the following based on my personal knowledge, information, and belief.

1. I am the plaintiff in the above captioned action and make this Affidavit for the purpose of obtaining an Order of Attachment against property of the defendants that is being held by the Highlands Coal & Chemical Corp., Suite 809, 414 Walnut Street, Cincinnati, Ohio 45202.

2. This Affidavit is made pursuant to §§ 2715.01 & 2715.03 of the Ohio Revised Code.

3. The nature of my claim against defendants is that they are obligated to pay to me \$20,000.00 for work performed pursuant to an oral contract to ar-

range financing. I was supposed to be paid in stock and defendants refused to pay.

4. The value of the stock involved is approximately \$20,000.00.

5. The nature of my claim is breach of contract.

6. My claim is just.

7. The ground for the attachment is that the individual Defendants are not residents of the State of Ohio and the corporate Defendant is a foreign corporation and not exempt from attachment.

Affiant further sayeth naught.

/s/ Harold Peck
Harold Peck

Sworn to and subscribed before me this 21st day of October, 1978.

/s/ Robert A. Pitcairn, Jr.
Notary Public

Robert A. Pitcairn, Jr. Attorney at Law
Notary Public - State of Ohio
My Commission has no Expiration date
Section 14703 R. C.

* * * * *

APPENDIX D-3

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

No. A7809432

HAROLD PECK

Plaintiff

v.

**DUNCAN-GRAY MINING CO.,
et al.**

Defendants

STATE OF OHIO :
: SS:

COUNTY OF HAMILTON:

AFFIDAVIT FOR SERVICE BY PUBLICATION

I, Robert A. Pitcairn, Jr., being first duly cautioned and sworn hereby state and depose the following:

1. I am an attorney licensed to practice law in the State of Ohio and am counsel for Harold Peck in the above captioned case.

2. On behalf of Mr. Peck I caused a complaint for the recovery of money to be filed against Duncan-Gray Mining Co. whose last known address was 2nd Floor, Citizens Plaza, Louisville, Kentucky 40202, James E. Duncan whose last known address was 1025 Dove Run Road, Lexington, Kentucky 40502 and Edward Gray whose last known address was Rural

Route 2, Lexington, Kentucky 40505, in the Hamilton County Court of Common Pleas on October 25, 1978. Said case has been assigned the number contained in the caption of this affidavit.

3. On October 27th I caused to be filed on behalf of Mr. Peck a provisional remedy by way of attachment to take property of the defendants that was located in Cincinnati, Ohio pursuant to the attachment statutes of the Ohio Revised Code.

4. On November 1, 1978 the sheriff of Hamilton County, Ohio attached 11,401 shares of Safe Tec, Inc. common stock, being enough of defendants' property to satisfy the amount claimed in the plaintiff's complaint, and duly filed his return on November 13, 1978.

5. When the complaint in this action was filed the Clerk of Courts of Hamilton County, Ohio attempted to serve each defendant by certified mail at the aforesaid last known addresses.

6. On November 6, 1978 I received notice from the Clerk of Courts that certified mail service addressed to defendants James E. Duncan and Edward Gray had been returned "Addressee Unknown".

7. On November 9, 1978 I received notice that certified mail service addressed to Duncan-Gray Mining Co. had been returned "Addressee Unknown".

8. After receiving the above mentioned notifications from the Clerk of Courts I caused an investiga-

tion to be made concerning the possible whereabouts of the three defendants by a telephone inquiry, checking with the United States Post Office and various phone calls with alleged friends and associates of said defendants. In each case I was informed that the residence of each defendant was unknown.

9. My investigation also revealed and reconfirmed the fact that neither of the individual defendants is a resident of the State of Ohio and that the corporate defendant is a foreign corporation.

10. Service of summons cannot be made on any of the defendants because the residence of each defendant is unknown to the undersigned and cannot with reasonable diligence be ascertained.

11. This affidavit for publication is made pursuant to Rule 4.4(A) of the Ohio Rules of Civil Procedure and § 2703.14(G) of the Ohio Revised Code.

Affiant further sayeth naught.

/s/ Robert A. Pitcairn, Jr.

Robert A. Pitcairn, Jr.

Sworn to and subscribed before me this 17th day of January, 1979.

/s/ James J. Chalfie

Notary Public

JAMES J. CHALFIE, Attorney at Law
NOTARY PUBLIC • STATE OF OHIO

My Commission has no expiration
date. Section 147.03 R. C.

(Notary Seal)

* * * * *

APPENDIX D-4
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. 7809432

HAROLD PECK

Plaintiff

v.

DUNCAN-GRAY MINING CO.,
et al.

Defendants

MOTION FOR DEFAULT JUDGMENT

Plaintiff moves the court for a judgment of default in the above entitled action against the defendant herein.

The defendants were served with notice of this suit by publication pursuant to Rule 4.4(A) of the Ohio Rules of Civil Procedure, an Affidavit in Proof of Publication was entered in the records of the Clerk of Courts of Common Pleas, Hamilton County, Ohio, on February 28, 1979, more than 28 days have passed since that date, and the defendants have failed to answer or otherwise defend as to the plaintiff's Complaint. Further, defendants have not served a copy of any answer or other defense which they might have had, nor have the defendants made any appearance herein nor have any proceedings been taken by the defendants herein.

WHEREFORE, plaintiff moves that this court make an enter judgment jointly and/or severally

against the defendants in the amount of \$20,000.00 plus interest at the maximum legal rate from February 1, 1976 together with costs.

/s/ Robert A. Pitcairn, Jr.
Robert A. Pitcairn, Jr.
Trial Attorney for Plaintiff
1504 First National Bank Bldg.
Cincinnati, Ohio 45202
Telephone: (513) 381-8616

* * * * *

APPENDIX D-5

FILED

APR 26 PM 4:09

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

No. A7809432

HAROLD PECK

Plaintiff

v.

DUNCAN-GRAY MINING CO.,

JAMES E. DUNCAN,

and

EDWARD GRAY

Defendants

REPORT OF REFEREE

The plaintiff having commenced an action for money against defendants by a complaint filed on October 25, 1978 and having properly obtained service of process on each defendant pursuant to the appropriate provisions of the Ohio Rules of Civil Procedure and each defendant having failed to plead or otherwise appear within the allowable time. And further upon the motion of plaintiff for a default judgment, with proper notice under the Rules of the Hamilton County, Ohio, Court of Common Pleas and the affidavit of plaintiff that the individual defendants are not in the military service. And finally upon proof satisfactory to the Referee as to the sufficiency

of service of process, notification of the hearing on the motion for a default judgment, and the sufficiency of the allegations contained in the complaint, it is hereby ordered and recommended to the Court that plaintiff recover against the defendants, jointly and severally, the sum of \$20,000.00 plus interest at the rate of 6% per annum from February 1, 1976 until paid and the costs of this action.

/s/ XXXXXXXXXXXX

Referee

REFEREE
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

* * * * *

APPENDIX D-6

**ENTERED
MAY 29 1976
IMAGE 386**

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

No. A7809432

HAROLD PECK

Plaintiff

v.

DUNCAN-GRAY MINING CO.,

JAMES E. DUNCAN

and

EDWARD GRAY

Defendants

JUDGMENT ENTRY

The plaintiff having commenced an action for money against defendants by a complaint filed on October 25, 1978 and having properly obtained service of process on each defendant pursuant to the appropriate provisions of the Ohio Rules of Civil Procedure and each defendant having failed to plead or otherwise appear within the allowable time. And further upon the motion of plaintiff for default judgment with proper notice under the rules of the Hamilton County, Ohio, Court of Common Pleas and the affidavit of plaintiff that the individual defendants are not in the military service. And further upon reference

to the Referee of this Court and proof satisfactory to said Referee as to the sufficiency of service of process, notification of the hearing on the motion for default judgment, and the sufficiency of the allegations contained in the complaint. And finally the Referee of this Court having made his report and filed the same on April 26, 1979 and no objections to said report having been filed, and it appearing to the Court that the report of the Referee should and hereby is affirmed in all respects:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff recover against the defendants, jointly and severally, the sum of \$20,000.00 plus interest at the of 6% per annum from February 1, 1976 until paid together with the costs of this action.

Frederick J. Cartolano, Judge
Court of Common Pleas

/s/ Robert A. Pitcairn, Jr.
Trial Attorney For Plaintiff

/s/ XXXXXXXXXXXXX
Referee

ENTERED
MAY 29 1979
IMAGE 387

* * * * *

APPENDIX E

**ENTERED
MAR 26 1981
IMAGE 364**

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

Case No. A-7809432

HAROLD PECK

Plaintiff

vs.

DUNCAN-GRAY MINING CO., et al Defendants

**ENTRY SETTING ASIDE DEFAULT
JUDGMENT AGAINST EDWARD GRAY**

By and between counsel for plaintiff and counsel for defendant, Edward Gray, it is hereby agreed and stipulated that the default judgment, previously entered in the within action against said defendant, Edward Gray, is hereby set aside and held for naught and the Clerk is instructed to cancel same. It is further agreed and stipulated that said defendant, Edward Gray, is hereby granted 30 days from the date this entry is journalized within which to answer, move or otherwise plead to the complaint in the within action.

/s/ Paul J. George

**/s/ William S. Wyler
William S. Wyler
Attorney for Plaintiff**

/s/ James M. Moore

James M. Moore

Attorney for Defendant, Edward Gray

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to Wm. Stewart Mathews, II, Attorney at Law, 1300 American Building, Cincinnati, Ohio, 45202, and to Robert F. Ristaneo, Attorney at Law, 504 Security Trust Building, Lexington, Kentucky 40507, by regular U.S. mail, this 26th day of March, 1981.

/s/ James M. Moore

James M. Moore

Attorney at Law

* * * * *

APPENDIX E-1

ENTERED
FEB 13 1981
IMAGE 359

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

Case No. A-7809432

HAROLD PECK

Plaintiff

vs.

DUNCAN-GRAY MINING CO.

JAMES E. DUNCAN

and

EDWARD GRAY

Defendants

(Judge Morrissey)

**ENTRY SETTING ASIDE DEFAULT
JUDGMENT AGAINST DUNCAN-GRAY
MINING COMPANY**

By and between counsel for plaintiff and counsel for defendant, Duncan-Gray Mining Co., sometimes referred to herein as Duncan-Gray Mining Co., Inc., it is hereby agreed and stipulated that the default judgment, previously entered in the within action against said defendant, Duncan-Gray Mining Co., is hereby set aside and held for naught and the Clerk is instructed to cancel same.

/s/ Judge Morrissey

/s/ William S. Wyler

William S. Wyler

Attorney for Plaintiff

/s/ James M. Moore

James M. Moore

Attorney for Defendant, Duncan Gray

Mining Co.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to W. Stewart Mathews, II, Attorney at Law, 1300 American Building, Cincinnati, Ohio, 45202, and to Robert F. Ristaneo, Attorney at Law, 504 Security Trust Building, Lexington, Kentucky 40507, by regular U.S. mail, this 13 day of February, 1981.

/s/ James M. Moore

James M. Moore

Attorney at Law

* * * * *